93-898

No.

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALLEN H. GROSNICK,

Petitioner,

-against-

PETER J. EMBRIANO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Rules 4(j), 8 and 12 of the Federal Rules of Civil Procedure permit a plaintiff to completely disregard an affirmative defense that a defendant was not properly served with a summons and complaint unless the defendant sets forth the grounds for the defective service with specificity?

2. Whether, before a plaintiff can be found to have failed to demonstrate "good cause" for not serving a defendant with a summons and complaint within 120 days of the filing of a complaint under Rule 4(j), the defendant must be prejudiced, there must be a lack of prejudice to the plaintiff and the motion must be made within 120 days of the filing of the complaint?

PARTIES TO PROCEEDINGS

In addition to petitioner and respondent, Richard K. Bernstein and The Bernstein Group, Inc. were parties to the proceedings below in their capacities as third party defendants.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALLEN H. GROSNICK,

Petitioner,

-against-

PETER J. EMBRIANO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the July 20, 1993 decision of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The July 20, 1993 decision and judgment of the United States Court of Appeals for the First Circuit are not officially reported and are contained in Appendix A and Appendix E (respectively). The September 3, 1993 order of the United States Court of Appeals for the First Circuit (which denied the petition for rehearing) is not officially reported and is contained in Appendix D. The September 18, 1992 memorandum and order of the United States District Court for the District of Massachusetts which dismissed respondent's complaint is not officially reported and is contained in Appendix B. The October 21, 1992 memorandum and order of the United States District Court for the District of Massachusetts which denied respondent's motion for reconsideration is not officially reported and is contained

in Appendix C. The November 17, 1992 judgment of the United States District Court for the District of Massachusetts which dismissed respondent's action is not officially reported and is contained in Appendix F.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1). The judgment and the decision of the United States Court of Appeals for the First Circuit which are sought to be reviewed were rendered on July 20, 1993, and the petition for rehearing was denied by the Court of Appeals on September 3, 1993.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

1. Rule 4(j) of the Federal Rules of Civil Procedure provides, in pertinent part:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. * * *

2. Rule 8(c) of the Federal Rules of Civil Procedure provides, in pertinent part:

> In pleading to a preceding pleading, a party shall set forth ... any other matter constituting an avoidance or affirmative defense.

3. Rule 12(b) of the Federal Rules of Civil Procedure provides, in pertinent part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required ... .

STATEMENT OF THE CASE

Respondent Peter J. Embriano commenced this action against petitioner in the United States District Court for the District of Massachusetts on September 14, 1990 pursuant to 28 U.S.C. Section 1332 and 15 U.S.C. Section 77v(a).

In his complaint, respondent asserted claims for fraud, negligent misrepresentation, breach of fiduciary duty and violations of federal and state securities laws on the grounds that petitioner (allegedly) misrepresented, or omitted to state, certain facts in connection with respondent's purchases of limited partnership interests from a third party.

The answer of petitioner denied the operative allegations in the complaint and asserted the affirmative defense (among others) that:

> [petitioner] was not properly served with the summons and com-

> plaint and, therefore, the court lacks jurisdiction over ... [petitioner] ... .

The basis for petitioner's affirmative defense of improper service was that, although a deputy sheriff had stated in his sworn (later determined to be perjured) return of service that he had personally served petitioner with the summons and complaint on September 26, 1990 in Longmeadow, Massachusetts, petitioner, in fact, was in Phoenix, Arizona on that date.

After receipt of petitioner's answer, respondent did nothing to determine the factual basis for the affirmative defense of improper service or to remedy the defective service, other than to continue to rely on the (perjured) return of service of the deputy sheriff.

Pursuant to a stipulation of the parties which was approved by the District Court, proceedings in the action were

suspended until February 21, 1992 when respondent recommenced the same. Petitioner then made a motion, pursuant to Rules 4(j), 12 and 56, to dismiss the action on the grounds that, contrary to the requirements of Rule 4(j), petitioner had not been served with the summons and complaint within 120 days of the filing of the complaint.

After conducting an evidentiary hearing, on September 18, 1992 the District Court issued a memorandum and order (Appendix B) holding that petitioner had not been properly served with process within 120 days of the filing of the complaint. The District Court further held that respondent had not shown good cause why such service was not made within the 120 day period, stating (Appendix B14):

> Here, it has not even been alleged that defendant tried to evade service. Plaintiff was on notice of the affirmative defense of insufficiency of service well

> within the 120-day window. Instead of investigating the adequacy of his initial service on receipt of defendant's answer, plaintiff did nothing. If plaintiff merely had inquired into the adequacy of the service, this may be a different case. At bottom, plaintiff has failed to show that good cause why service was not made within the 120-day time period, and this case must be dismissed without prejudice.

The District Court thereafter denied respondent's motion for reconsideration (Appendix C), and judgment dismissing respondent's action was entered on November 17, 1992 (Appendix F).

Respondent appealed, and on July 20, 1993 the United States Court of Appeals for the First Circuit reversed the District Court's dismissal of the action (Appendix A).

The Court of Appeals held, contrary to the purpose and intent of Rules 4(j), 8 and 12 of the Federal Rules of Civil Procedure, that the District Court had abused its discretion in dismissing the

action because respondent had demonstrated good cause for failing to serve petitioner within the 120 day period required by Rule 4(j).

Specifically, the Court of Appeals held that good cause for failing to properly serve petitioner existed because:

(1) Respondent reasonably believed that petitioner had been personally served (and, therefore, reasonably abstained from investigating the basis for petitioner's affirmative defense of improper service) based upon the (perjured) statements in the deputy sheriff's return of service and the failure of petitioner to state the specific nature of the defective service in his affirmative defense (Appendix A6-7).

(2) The defective service did not prejudice petitioner, whereas dismissal of the action would prejudice respondent because the statute of limitations with

respect to his federal securities law claims had expired (Appendix A7).

(3) Petitioner improperly waited more than 120 days to notify respondent of the specific nature of the defect in service (Appendix A7).

On July 20, 1993 the Court of Appeals entered judgment reversing the judgment of the District Court (Appendix E), and on September 3, 1993 the Court of Appeals denied petitioner's petition for rehearing (Appendix D).

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS EFFECTIVELY ELIMINATED THE AFFIRMATIVE DEFENSE OF IMPROPER SERVICE OF PROCESS

Notwithstanding petitioner's affirmative defense of improper service, the Court of Appeals held that respondent reasonably believed petitioner had been

properly served based upon the (perjured) statements of the deputy sheriff and the lack of specificity in such defense regarding the nature of the defective service. The Court of Appeals, therefore, essentially concluded that an affirmative defense of improper service may be completely disregarded by a plaintiff.

In determining "good cause" for purposes of Rule 4(j), however, it is clear that a party is deemed to be on notice of a defect in service based upon a generally stated affirmative defense of improper service.

"[A]n affirmative defense may be pleaded in general terms and will be held to be sufficient ... as long as it gives plaintiff fair notice of the nature of the defense." 5 C. Wright & A. Miller, Federal Practice And Procedure: Section 1274 (1990), at 455. Accord Marine Overseas Services, Inc. v. Crossocean Shipping Co.,

791 F.2d 1227, 1233 (5th Cir. 1986) ("The pleading of affirmative defenses is governed by the same liberal standards as those for a complaint. Such averments are to be 'simple, concise, and direct,' and will be 'construed as to do substantial justice.'" (citations omitted)). See McGregor v. United States, 933 F.2d 156, 158 (2d Cir. 1991) (wherein the affirmative defense that "[p]laintiff's complaint fails for sufficiency of process..." was held to be adequate); Schnabel v. Wells, 922 F.2d 726 (11th Cir. 1991); McDonald v. United States, 898 F.2d 466 (5th Cir. 1990); Way v. Mueller Brass Co., 840 F.2d 303 (5th Cir. 1988). Compare Santos v. State Farm Fire and Casualty Co., 902 F.2d 1092 (2d Cir. 1990); Roque v. United States, 857 F.2d 20 (1st Cir. 1988).

Furthermore, once an affirmative defense of improper service is interposed, a plaintiff must investigate the basis for

the alleged defect in order to satisfy the "good cause" requirement of Rule 4(j). McGregor v. United States, 933 F.2d at 159; Schnabel v. Wells 922 F.2d at 729; McDonald v. United States, 898 F.2d at 468; Way v. Mueller Brass Co., 840 F.2d at 306; Wei v. State of Hawaii, 763 F.2d 370 (9th Cir. 1985).

Conversely, mere reliance on the statement of a process server, without investigating the basis for an affirmative defense contesting the propriety of service, does not constitute "good cause" under Rule 4(j). Lovelace v. Acme Markets, Inc., 820 F.2d 81 (3rd Cir.), cert. denied, 484 U.S. 965 (1987); Braxton v. United States, 817 F.2d 238 (3rd Cir. 1987). See also Reynolds v. United States, 782 F.2d 837 (9th Cir. 1986).

Indeed, the Court of Appeals recognized (but inexplicably did not follow) the above authority by stating that "under

certain circumstances, the assertion in an answer of insufficient service will provide notice that would induce a reasonable plaintiff to investigate the possibility of a deficiency" (Appendix A9) and that "there is no requirement that a defendant specify the source of the defect in the service" (Appendix A9).

Accordingly, absent the issuance of a writ of certiorari, the holding of the Court of Appeals will permit a plaintiff to disregard an affirmative defense of improper service (and do nothing to determine the basis for the same) and rely on (possibly perjured) statements in a return of service, unless the specific nature of the defective service is set forth in the defense by a defendant.

Such a result, however, is not only contrary to existing authority in other circuits but, more importantly, effectively eliminates the affirmative defense of

improper service and negates the purpose and intent of Rules 4(j), 8 and 12.

As noted in Lovelace v. Acme Markets, Inc., 820 F.2d at 85:

> [A] lack of diligence and inadvertance [by plaintiff's counsel] to the running of the 120-day period, even when dismissal under Fed. R. Civ. P. 4(j) could spell the end of ... [plaintiff's] cause of action, cannot be excused if the legislative intent for a strict interpretation of Fed. R. Civ. P. 4(j) is to be followed and the requirement of Fed. R. Civ. P. 4(a) is not to be rendered illusory.

Accord Wei v. State of Hawaii, 763 F.2d at 372.

II

THE COURT OF APPEALS IMPROPERLY HELD THAT GOOD CAUSE PURSUANT TO RULE 4(j) REQUIRES PREJUDICE TO A DEFENDANT, THE ABSENCE OF PREJUDICE TO A PLAINTIFF AND THAT A MOTION UNDER RULE 4(j) BE MADE WITHIN 120 DAYS

The Court of Appeals further held that, before a plaintiff can be found to have

failed to demonstrate "good cause" under Rule 4(j), a defendant must be prejudiced from the improper service, a plaintiff must not be prejudiced and a motion pursuant to the Rule must be made before the 120-day period in the Rule has expired.

Rule 4(j), however, does not require that a defendant be prejudiced before a plaintiff can be found to have failed to demonstrate "good cause". West Coast Theater Corp. v. City of Portland, 897 F.2d 1519 (9th Cir. 1990). See Floyd v. United States, 900 F.2d 1045 (7th Cir. 1990).

Indeed, because a defendant will virtually never be prejudiced by a 120 day delay of service, conditioning dismissal under Rule 4(j) on a showing of prejudice to a defendant completely emasculates the provisions of the Rule.

Moreover, prejudice to a plaintiff from the dismissal of an action because of the expiration of a statute of limitations is

not a valid consideration in determining good cause under Rule 4(j).

> In enacting Rule 4(j), however, Congress recognized the possibility that a plaintiff's cause of action would be barred if the statute of limitations expired prior to the court's dismissal under Rule 4(j). 1982 U.S. Code Cong. & Admin News 4434, 4441-42. Thus the fact that ... [plaintiff] is now effectively precluded from bringing suit against ... [defendant] does not prevent the operation of Rule 4(j).

Geiger v. Allen, 850 F.2d 330, 334 (7th Cir. 1988). Accord Lovelace v. Acme Markets, Inc., 820 F.2d at 85; Wei v. State of Hawaii, 763 F.2d at 372; Winters v. Teledyne Movible Offshore, Inc., 776 F.2d 1304 (5th Cir. 1985); Norlock v. City of Garland, 768 F.2d 654 (5th Cir. 1985); Green v. Humphrey Elevator and Truck Co., 816 F.2d 877 (3rd Cir. 1987).

Finally, the Court of Appeals effectively held that a motion under Rule 4(j), which would notify a plaintiff of the

specific basis for the affirmative defense of improper service, must be made before the 120 day period in the Rule has expired. Rule 4(j), however, does not mandate that a motion to dismiss be made prior to the expiration of the 120-day period and, until the 120-day period has expired, any such motion would be premature.

Thus, unless a writ of certiorari is issued, Rule 4(j) will have been effectively amended by the Court of Appeals to require prejudice to a defendant, and an absence of prejudice to a plaintiff, from an improper service and, in addition, that a motion under Rule 4(j) be made within 120 days of the filing of the complaint.

CONCLUSION

If a writ of certiorari is not issued to the Court of Appeals, the provisions of Rule 4(j), 8 and 12 of the Federal Rules

of Civil Procedure will have been either completely negated or substantially changed. At the very least, the decision of the Court of Appeals constitutes a radical departure from, and fundamentally conflicts with, existing authority in other circuits regarding the interpretation and construction of such Rules which is sufficiently important to be corrected and/or resolved by this Court.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1004

EDWARD H. BENJAMIN,
Plaintiff, Appellant,

v.

ALLEN H. GROSNICK,
Defendant, Appellee.

No. 93-1005

PETER J. EMBRIANO
Plaintiff, Appellant,

v.

ALLEN H. GROSNICK,
Defendant, Appellee.

APPEALS FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Frank H. Freedman,
U.S. District Judge]

Before

Torruella, Circuit Judge,
Feinberg,* Senior Circuit Judge,
and Boudin, Circuit Judge.

[*Of the Second Circuit, sitting by designation]

C. Brian McDonald, with whom Ronald P. Weiss, Gerald P. Ciejka and Bulkley, Richardson and Gelinas, were on brief for appellants.

Robert Aronson, with whom Law Offices of Robert Aronson, was on brief for appellee.

July 20, 1993

TORRUELLA, Circuit Judge. In companion cases, appellants, Edward Benjamin, M.D. and Peter Embriano, M.D., sued appellee Allen Grosnick for deceit, fraud, negligent misrepresentation, breach of fiduciary duty, and violations of state and federal securities law. The district court dismissed the claims on the ground that appellants failed to properly serve pleadings upon appellee within the required one hundred twenty days of filing suit. We affirm the district court's

judgment with respect to Benjamin and reverse it with respect to Embriano.

BACKGROUND

Appellants filed complaints against appellee on September 14, 1990. Twelve days later, Deputy Sheriff Paul Bianconi executed returns of service, swearing that he personally served appellee at 167 Dwight Street, Longmeadow, Massachusetts with both set of pleadings. After procuring an extension, appellee answered alleging improper service of process in both cases and insufficient process in Benjamin's case. On the same day, appellee also filed a third party complaint and began discovery. Six weeks later, the court approved an agreement by the parties to stay the proceedings for reasons irrelevant to this appeal.

Eventually, the stay ended, and a scheduling conference was held at which appellee made a vague assertion that

appellants' service failed to comply with Rule 4 of the Federal Rules of Civil Procedure.[1] [Footnotes appear at the end.] At that time, he also asserted that process was insufficient in Benjamin's case because he was served with the wrong complaint.[2]

On April 30, 1992, appellee moved to dismiss the actions pursuant to Rule 4(j) of the Federal Rules of Civil Procedure for untimely service. In support of the motions, appellee submitted an affidavit claiming that, while the returns of service indicated that personal service took place in Massachusetts, he was not in Massachusetts on the alleged date of service. At this point, it became clear that this was the basis of the insufficient service defenses. In addition, appellee reiterated in the affidavit that even if the method of service sufficed, the process itself did not because

Benjamin never served him with the proper complaint. In opposition, appellants submitted affidavits by the deputy sheriff stating that he had personally served appellee on the record date. Appellants then re-served appellee properly.

After an evidentiary hearing, the district court found that appellee was in Arizona on the service date, and that appellants therefore failed to personally serve him within the 120 day limit. Then, finding that appellants failed to show good cause for the delayed service, the court dismissed the action without prejudice.[3] The district court denied appellants' request for reconsideration, and appellants filed this appeal.

DISCUSSION

Under Fed. R. Civ. P. 4(j), if a plaintiff fails to properly serve a named defendant within 120 days after filing a complaint, he must show "good cause why

such service was not made within that period" or face dismissal.[4] We review a district court's determination of whether a plaintiff established good cause only for abuse of discretion. United States v. Ayer, 857 F.2d 881, 884-85 (1st Cir. 1988).

With respect to appellants' alleged insufficient service, we find the district court's dismissal an abuse of discretion. Appellants did not purposely delay personal service. Indeed, they completed all of the steps within their power necessary to effectuate such service. The blame for the error rested with the deputy sheriff. Moreover, because of the deputy sheriff's sworn representations in the return of service, appellants reasonably believed that they had personally served appellees.

Furthermore, although appellee's answers to appellants' complaints alleged

insufficient service, appellee waited more than 120 days to notify appellants of the defect's specific nature. Given the general nature of appellee's asserted defense and the deputy sheriff's assurance in the return of service that he had personally served appellee, appellants reasonably abstained from further investigation.

Still further, the defective service did not prejudice appellee. See Ayer, 857 F.2d at 881 (considering prejudice to defendant in Rule 4(j) determination). Appellee had actual notice of the lawsuit and secured through stipulation additional time to file an answer. Conversely, dismissal will prejudice appellants because the statute of limitations has already run on their federal statutory claims. See Floyd v. United States, 900 F.2d 1045, 1046 (7th Cir. 1990) (considering prejudice to plaintiff in Rule 4(j)

determination).

Given all of the above factors, we conclude that appellants showed good cause for the delayed personal service. In its finding to the contrary, the district court erroneously relied on Rogue v. United States, 857 F.2d 20, 22 (1st Cir. 1988),[5] which held that:

> [G]iven the [defendant's] answer which did not clearly allege insufficient service of process, the government's failure plainly to assert insufficiency until after the 120 days had run, the confusion caused by the district court's initial denial of the government's motion, the simple manner in which the service deficiency can be cured, and the absence of any articulable prejudice to the [defendant], we think the district court should have found good cause.

(emphasis added). By implication, the district court found that where a defendant clearly alleges insufficient service within the 120 day limit, the plaintiff is on notice of some defect, and therefore must inquire into the nature of

that defect. We agree with the district court that under certain circumstances, the assertion in an answer of insufficient service of process will provide notice that would induce a reasonable plaintiff to investigate the possibility of a deficiency. In addition, there is no requirement that a defendant specify the source of the defect in the service. However, the lack of such specificity bears on the reasonableness of the plaintiff's actions. In the present case, Grosnick did not specify the source of the defect until it was too late for appellants to cure it. Where as here, appellants, relying on an attested return of service by the deputy sheriff, believed that they had properly effected service, and indeed did everything in their power to do so, Rogue does not imply that failure to investigate after a general assertion of insufficient service prevents

a finding of good cause. We therefore reverse the court's judgment with respect to appellants' delay of personal service.

On the other hand, we cannot easily forgive Benjamin's alleged service of insufficient process. Although the district court requested a statement of contested facts, Benjamin never disputed appellee's allegation that he was served with the wrong complaint. Indeed, although appellee mentioned the problem numerous times on the record, and again on appeal, Benjamin has yet to acknowledge it. Accordingly, we accept the allegation as true.

Also because of Benjamin's failure to acknowledge the allegation, we cannot possibly conclude that he has met his burden of establishing good cause why service of the proper complaint was delayed. We do not know with whom the error originated, when Benjamin knew about

it, or even whether the deficiency was intentional. By ignoring these major gaps in the procedural history, and indeed the entire issue, Benjamin failed to establish good cause for the delayed service of sufficient process. Thus, we affirm the district court's dismissal of Benjamin's case on different grounds than the court stated.

Affirmed in part; reversed in part.

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1. See the appendix for the text of Rule 4.

2. Appellee contends that while the summons properly cited the appropriate case names, the complaint that the sheriff delivered for Benjamin regarded an action by Benjamin against Richard K. Bernstein and The Bernstein Group, Inc. in the United States District Court for the District of Connecticut. While that lawsuit concerned similar interests, the complaint for that action did not name appellee as defendant.

3. Although the court dismissed the claims without prejudice, the statute of limitations bars the refiling of appellants' federal statutory claims.

4. Rule 4(j) provides in relevant part:

> If a service of the summons is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice ... .

5. Although a district court's good cause finding is entitled to great deference, such a finding "'predicated upon, or induced by, a misapprehension of law is robbed of its customary vitality.'" Reliance Steel Products v. National Fire Ins. Co., 880 F.2d 575, 577 (1st Cir. 1989)(quoting RCI Northeast Services Div. v. Boston Edison Co., 822 F.2d 199, 203 (1st Cir. 1987)).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PETER J. EMBRIANO, M.D.,)
)
Plaintiff,)
)
v.)
)
ALLEN H. GROSNICK,)
)
Defendant and)
Third-Party Plaintiff)
)
v.)
)
RICHARD K. BERNSTEIN and THE)
BERNSTEIN GROUP, INC.,)
)
Third-Party Defendants)

CIVIL ACTION NO. 90-30186-F

MEMORANDUM AND ORDER

September 18, 1992

FREEDMAN, S.J.

I. INTRODUCTION

This is an action sounding in securities fraud. Plaintiff Peter J. Embriano, M.D., filed a complaint against defendant Allen H. Grosnick alleging violations of federal and state laws. Defendant filed an answer to the

complaint, and also filed claims against third-party defendants Richard K. Bernstein and The Bernstein Group, Inc. Included in defendant's answer was the affirmative defense that defendant was not properly served with the summons and complaint. Before the Court is defendant's motion to dismiss the action for failure to effectuate proper service of process. See Federal Rule of Civil Procedure 4.

The Court held an evidentiary hearing on September 2, 1992 to determine whether defendant was properly served and, if not, whether plaintiff had shown good cause for failure to do so. For the reasons set forth below, the Court will dismiss plaintiff's suit without prejudice.

II. PROCEDURAL HISTORY

On September 14, 1990, plaintiff filed a complaint against defendant Grosnick. On September 26, 1990, Deputy Sheriff Paul

Bianconi allegedly served process upon defendant. The return of service, signed by Mr. Bianconi, stated that he had delivered the summons and complaint personally upon defendant at his business address, 167 Dwight Road, Longmeadow, Massachusetts. Plaintiff subsequently relied upon this attested-to return of service as proof that defendant had been personally served.

On October 31, 1990, defendant filed an answer to the complaint, and also lodged a third-party complaint against third-party defendants Richard K. Bernstein and The Bernstein Group, Inc. Included in defendant's answer was the affirmative defense that service of process was improper.

On December 14, 1990 the parties involved entered into a stipulation which provided that the action would be held in abeyance pending the filing by plaintiff

of a notice of intent to proceed. The Court approved the stipulation on December 14, 1990. On February 21, 1992, plaintiff served a notice of intent to proceed, and on April 14, 1992 a scheduling conference was held.

On April 30, 1992 defendant filed a motion to dismiss the action on the grounds that the summons and complaint were not served upon defendant in accordance with Federal Rule of Civil Procedure 4(d) within 120 days after the filing of the complaint as required by Fed. R. Civ. P. 4(j) ("Rule 4(j)"). Subsequently, on May 29, 1992, defendant filed a reply memorandum in further support of his application to dismiss the action. Plaintiff finally served defendant properly on June 6, 1992.

Defendant requested and was granted an evidentiary hearing on September 2, 1992 so that the Court could review affidavits,

letters and receipts, and hear testimony by Deputy Sheriff Bianconi on the defendant's motion. The essence of defendant's defense is that he was in Phoenix, Arizona on September 26, 1990 and could not have been personally served by Deputy Sheriff Bianconi.

III. DISCUSSION

A. Effective Service

Federal Rule of Civil Procedure 4(d) requires that a summons and complaint be served together by plaintiff

> upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment of law to receive service of process.

Fed. R. Civ. P. 4(d)(1).

Furthermore, Rule 4 of the Federal Rules of Civil Procedure provides:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Fed. R. Civ. P. 4(j). Ordinarily dismissal without prejudice means that the dismissal itself does not bar the bringing of a subsequent action on the same claim or claims. However, it does not mean that

> every plaintiff against whom the statute of limitations has run, even one who has carelessly allowed that period to expire without proper service after having been alerted that his prior service was inadequate, would be protected against dismissal.

Santos v. State Farm Fire and Casualty Co., 902 F.2d 1092 (2d Cir. 1990).

At the evidentiary hearing, defendant

produced a wealth of information, in the form of testimony, affidavits, letters and receipts, that showed he was in Phoenix, Arizona on September 26, 1990, and could not have been served by Deputy Sheriff Bianconi, despite the attestation, in Longmeadow, Massachusetts on that day. Plaintiff produced the Deputy Sheriff who testified that he had a vague recollection of serving "someone in that office" on the day in question. Weighing the evidence before it, the Court finds that defendant was in Phoenix on September 26, 1990 and, as a result, plaintiff did not effectively serve defendant on that day.

Plaintiff inquired at the evidentiary hearing whether the 120-day time period for effectuating service under Rule 4(j) should be equitably tolled because the parties had agreed to a suspension of the action from December 14, 1990 to February 21, 1992. The Court does not have to

decide this question, because even if the court were to accept a tolling of the time limit required by Rule 4(j), plaintiff still would have failed to comply with the 120-day limit. Plaintiff filed his complaint on September 14, 1990. The stipulation to suspend the proceedings was entered into on December 14, 1990. On February 21, 1992, plaintiff served a notice of intent to proceed, and defendant was effectively served on June 12, 1992. If the time period during which the proceedings were suspended (December 14, 1990 through February 21, 1992) is omitted from the time period calculations, well over 120 days had passed from the time the complaint was filed on September 14, 1990 and the time when process was effectively served on June 12, 1992.

In summary, the Court concludes that the requirements of Fed. R. Civ. P. 4(d)(1) have not been met, and as a

result, plaintiff did not effectively execute service upon defendant within the time limit set by Rule 4(j).

B. Good Cause

The second part of Rule 4(j) states that if plaintiff has not effectuated service effectively within the 120-day window, he must show good cause why service was not made. Addressing good cause, the Seventh Circuit in Floyd v. United States, 900 F.2d 1045 (7th Cir. 1990), stated:

> Without attempting a rigid or all-encompassing definition of 'good cause', it would appear to require at least as much as would be required to show excusable neglect, as to which simple inadvertance or mistake of counsel or ignorance of the rules usually does not suffice ...

Id. at 1047 (citing Winters v. Teledyne Movable Offshore Inc., 176 F.2d 1304 (9th Cir. 1985)). The First Circuit has stated that:

[T]he court has a systematic

> interest in the progress of its own docket and in management of a burgeoning flow of litigation. To meet this amalgam of needs, the rule 4(j) provides a stern sanction -- dismissal unless service is perfected within the one hundred and twenty day limit or there is good cause for the time overrun.

United States v. Ayer, 857 F.2d 881 (1st Cir. 1988).

Unsuccessful efforts by counsel to effect service of process prior to the deadline do not necessarily excuse a delay, even when dismissal results in the plaintiff's case being time-barred due to the fact that the statute of limitations on the cause of action has run. See Schiavone v. Fortune, 477 U.S. 21 (1986). Furthermore, when there is a lack of diligent effort to ensure timely service of process, an extension of time for service may be refused. See Lovelace v. Acme Markets Inc., 820 F.2d 81 (3rd Cir. 1987); Coleman v. Greyhound Lines Inc.,

100 F.R.D. 476, 477-78 (N.D. Ill. 1984).

In any event, this Court is bound by implication of the holding in Rogue v. United States, 857 F.2d 20 (1st Cir. 1988). In Rogue, the defendant sought a motion to dismiss for insufficiency of service pursuant to Rule 4(j). The First Circuit upheld the district court's denial of the motion stating:

> In sum, given the government's [defendant's] answer which did not clearly allege insufficient service of process, the government's failure plainly to assert insufficiency until after the 120 days had run, the confusion caused by the district court's initial denial of the government's motion, the simple manner in which the service deficiency can be caused, and the absence of any articuable prejudice to the government, we think the district court should have found good cause.

Id. at 22.

In McGregor v. United States, 933 F.2d 156 (2nd Cir. 1991), defendant's answer identified insufficiency of process as an

affirmative defense well within the 120-day time period in which plaintiff's attorneys could have cured any defect in process by re-serving. However, plaintiff's attorneys neglected to inquire as to the specific character of the defect in process until some fourteen months later, and the court dismissed the case pursuant to Rule 4(j).

The plaintiff in McGregor made a vain attempt to rely on Rogue as support for denying the motion to dismiss. The court, however, distinguished the case:

> Most importantly, the answer [in the Rogue case] did not refer to any defect in process at all but relied on the affirmative defenses of lack of jurisdiction over the person of the defendant and sovereign immunity. The court there noted that 'the [defendant's] actions seem calculated to have kept its true objection hidden until the one hundred twenty days for service had run.'

Id. at 160 (citing Rogue, 857 F.2d at 20-21). The factual circumstances in this

case mirror those in McGregor, because there, defendant made no effort to be deceptive. In this case, defendant's answer clearly alleged insufficient service well within the 120-day limit. Plaintiff, then, effectively was put on notice of the defect, and had ample time to inquire as to the sufficiency of process, even by telephone, and, if necessary to cure the defect. Plaintiff instead did nothing.

Plaintiff cites Ayer for the proposition that Rule 4(j) is "intended to be a useful tool for docket management, and not a tool of oppression." Id. at 885-86. The Ayer court found plaintiff had good cause for ineffectively serving defendant, and refused to dismiss the case. Ayer, though, involved different factual circumstances than the case at hand. In Ayer, defendant did not raise the issue of improper service in his answer, and

plaintiff made several diligent efforts to serve defendant.

Similarly, the other case plaintiff cites in support of his position involved a defendant who was evading service. D'Amario v. Russo, 750 F. Supp. 560 (D.R.I. 1990) ("First, plaintiff's exhibits indicate that defendants ... tried to evade service. It appears that plaintiff's mailings to those defendants served as an 'early warning' to them and they then managed to evade personal service when the constable came around thereafter."). Evasion of service by a putative defendant constitutes good cause for failure of service under Rule 4(j). See Varela v. Velez, 814 F.2d 821, 823 (1st Cir. 1987) (citations omitted).

Here, it has not even been alleged that defendant tried to evade service. Plaintiff was on notice of the affirmative defense of insufficiency of service well

within the 120-day window. Instead of investigating the adequacy of his initial service on receipt of defendant's answer, plaintiff did nothing. If plaintiff merely had inquired into the adequacy of the service, this may be a different case. At bottom, plaintiff has failed to show that good cause why service was not made within the 120-day time period, and the case must be dismissed without prejudice.

IV. CONCLUSION

For the reasons explained above, defendant's motion to dimiss the complaint without prejudice is GRANTED.

It is So Ordered.

/s/ Frank H. Freedman
Senior United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PETER J. EMBRIANO, M.D.,	)
	)
Plaintiff,	)
v.	)
	)
ALLEN H. GROSNICK,	)
	)
Defendant and Third-Party Plaintiff	)
	)
v.	)
	)
RICHARD K. BERNSTEIN and THE BERNSTEIN GROUP, INC.,	)
	)
Third-Party Defendants	)

CIVIL ACTION NO. 90-30186-F

MEMORANDUM AND ORDER

October 21, 1992

FREEDMAN, S.J.

The Court has read the submissions of the parties regarding plaintiff Peter J. Embriano's motion for reconsideration of this Court's September 18, 1992 Memorandum and Order dismissing plaintiff's complaint without prejudice. In particular, plaintiff requests reconsideration of the

Court's determination that plaintiff's reliance upon the return of service executed by Deputy Sheriff Paul Bianconi did not constitute good cause for failure to serve the defendant within 120 days of filing of the complaint.

In support of his position, plaintiff asserts that reasonable efforts were made to serve the defendant and that defendant enaged in deceptive tactics to avoid service. First, plaintiff argues that on November 2, 1990 plaintiff's counsel, after receiving the defendant's answer, "confirmed" that the summons and complaint had been personally served on defendant, so reasonable efforts were taken to ensure proper service. The Court is troubled by this assertion, because the alleged verification of service by plaintiff's attorney was not raised at the evidentiary hearing held on September 2, 1992, nor discussed in any previous documents

submitted to this Court by plaintiff. Moreover, plaintiff's counsel, in his affidavit, does not state the substance of the alleged confirmation; perhaps plaintiff is merely reasserting that his reliance on the Deputy's signature constitutes good cause. At bottom, it is impossible for the Court to guage the sufficiency of the purported confirmation by plaintiff's counsel.

Second, plaintiff's assertion that defendant engaged in deceptive tactics is simply without merit. Defendant's answer, served on plaintiff on October 31, 1990, clearly stated insufficiency of process as a defense. Plaintiff thereafter was on notice of this affirmative defense, and had ample time to investigate the adequacy of their initial service and correct any errors.

As a result, the Court DENIES plaintiff's motion for reconsideration.

It is So Ordered.

/s/ Frank H. Freedman
Senior United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1005

PETER J. EMBRIANO,
Plaintiff, Appellant,

v.

ALLEN H. GROSNICK,
Defendant, Appellee.

BEFORE

Breyer, Chief Judge
Torruella, Circuit Judge
Selya, Circuit Judge
Cyr, Circuit Judge
Boudin, Circuit Judge
Stahl, Circuit Judge
Feinberg* Senior Circuit Judge

ORDER OF THE COURT

Entered: September 3, 1993

The panel of judges that rendered the decision in this case having voted to deny a petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the Judge of the Court in regular

active service and a majority of said judges not having voted to order that the appeal be heard reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court

FRANCIS P. SCIGLIANO
FRANCIS P. SCIGLIANO, Clerk

[*Of the Second Circuit sitting by designation]

[cc: McDonald and Aronson]

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1004

EDWARD H. BENJAMIN,
Plaintiff, Appellant,

v.

ALLEN H. GROSNICK,
Defendant, Appellee.

No. 93-1005

PETER J. EMBRIANO,
Plaintiff, Appellant,

v.

ALLEN H. GROSNICK,
Defendant, Appellee.

JUDGMENT

July 20, 1993

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now

here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed as to appellant Benjamin and reversed as to appellant Embriano.

By the Court:

Clerk

(cc: Messrs. McDonald, Aronson)

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PETER J. EMBRIANO, M.D.

v.

ALLEN H. GROSNICK, ET AL

JUDGMENT IN A CIVIL CASE

CASE NUMBER 90-30186-F

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

JUDGMENT OF DISMISSAL ENTERED FOR THE DEFENDANT PURSUANT TO THE MEMORANDUM AND ORDER OF THE COURT ENTERED ON SEPTEMBER 18, 1992.

November 17, 1992
Date

ROBERT J. SMITH, JR.
Clerk

/s/ John C. Stuckenbruck
(By) Deputy Clerk